(2)

00-828

Supreme Court, U.S.
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JAN 24 2001
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CONCHA DUBOSE

Petitioner

vs.

PEOPLE OF THE STATE OF MICHIGAN

Respondent

◇

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTORIARI

◇

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

I.

DID THE TRIAL COURT ERR IN REFUSING THE PETITIONER'S REQUEST FOR A CONTINUANCE OF TRIAL AND DETERMINING THAT THE MOST EXPERIENCED OF PETITIONER'S TWO RETAINED COUNSEL COULD PROVIDE EFFECTIVE ASSISTANCE WHEN IN FACT ONE ATTORNEY WAS ABSENT FOR ONLY A PORTION OF THE TRIAL; AND THE PETITIONER DID NOT SUFFER ANY PREJUDICE AS A RESULT OF THE TRIAL COURT'S RULING?

STATEMENT OF THE CASE

On the day scheduled for trial, February 24, 1997, Arthur Brand and Rosemary Robinson, counsel retained by the defendant, appeared on her behalf. Both placed their appearances on the record, with no suggestion that one was inferior to the other. 2/24/97, 5-6. Because counsel contested the admissibility of the defendant's pretrial statements to the police, the trial court held an evidentiary hearing to resolve the question. With Brand present, Robinson questioned the witnesses. 2/24/97, 12-17, 22-27, 34-39. At the end of the hearing, jury selection began; Brand participated in the voir dire and the jury was empaneled.

Trial resumed the next day and Robinson requested an adjournment because Brand was not present; he had taken ill. 2/25/97, 50-51. But Brand did appear later in the day and he did participate in the examination of witnesses. 2/25/97, 148, 162-166, 169, 172-182. All of the testimony was presented on February 25, 1997.

The next day Robinson presented a closing argument and the case went to the jury for deliberation at 11:25 a.m.. 12/26/97, 70.

At 12:30 p.m., after less than sixty-five minutes of deliberation, the jury returned a verdict of guilt on both charges, second degree murder and possession of a firearm in the commission of a felony.

REASONS FOR DENYING THE WRIT

This is not a deprivation of counsel case; the Sixth Amendment is not at all implicated. This bold and unequivocal statement of opposition to the petitioner's demand for writ of certiorari is based upon the unambiguous facts of the case. The petitioner retained counsel of her choice, Arthur Brand and Rosemary Robinson. On the day scheduled for trial both attorneys appeared and placed their unqualified appearances on the record. Robinson, on behalf of the petitioner, contested the admissibility of the petitioner's pretrial statements to the police and lead the defense in the examination of witnesses during the evidentiary hearing which the trial court granted. Immediately after the resolution of the question, the trial court called for a jury panel and jury selection began with Brand participating in the voir dire and exercising challenges as he saw fit. Brand was not present the morning of the second day of trial, but Robinson was. Robinson requested a continuance, stating that Brand had unexpectedly become ill. The trial court determined that a continuance was not necessary since the petitioner's case was in the

capable hands of one of her attorneys of choice. Brand did appear later in the day and did participate in the examination of witnesses. The defense rested its case at the end of that day and Robinson gave the defense closing argument the next morning.

The petitioner has mistakenly characterized the trial court's ruling as structural and argues that a new trial is required. "Structural error is an error affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v Fulminante*, 499 US 279, 310, 111 SCt 1246, 113 LEd2d 302 (1991). The distinction between "structural error" and "trial error" is an important one because it determines how review should proceed: structural error renders an entire trial inherently unfair and, therefore, warrants automatic reversal, while trial error requires analysis to determine the extent of its impact in the circumstances -- whether it was harmless. Sixth Amendment violations which amount to structural error include the *total deprivation* of the right to counsel. *Gideon v Wainright*, 372 US 335, 83 SCt 792, 9 LEd2d 799 (1963); a trial court's order preventing a defendant from consulting with his

attorney at all during a recess between his direct and cross-examination, *Geders v United States*, 425 US 80, 96 SCt 1330, 47 LEd2d 592 (1976): the trial court's refusal to allow counsel to be heard in summation of the evidence, *Herring v New York*, 422 US 853, 95 SCt 2550, 45 LEd2d 593 (1975); a statute requiring a defendant to testify before any other defense evidence was presented deprived the defendant of the advice of counsel in making the decision, *Brooks v Tennessee*, 406 US 605, 92 SCt 1891, 32 LEd2d 358 (1972): the denial of counsel at arraignment, the stage at which insanity must be pleaded or the defense forfeited, *Hamilton v State of Alabama*, 368 US 52, 82 SCt 157, 7 LEd2d 114 (1961): the denial of counsel at a preliminary hearing where a plea was entered, *White v Maryland*, 373 US 59, 83 SCt 1050, 10 LEd2d 193 (1963): a statute permitting the admission only of the defendant's unsworn statement and the denial of the right to have counsel examine the defendant regarding it, *Ferguson v Georgia*, 365 US 570, 81 SCt 756, 5 LEd2d 783 (1961); the refusal to

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appoint counsel before entry of the defendant's plea. *Williams v Kaiser*. 323 US 471. 65 SCt 363. 89 Led 398 (1945). Only when a defendant had actually been deprived of the advice or representation of counsel at a stage when it was necessary to the defense, was structural error found which required automatic reversal. This petitioner was not deprived of counsel; her trial was not inherently unfair. In this case. nothing resembling a Sixth Amendment deprivation occurred. As much as the petitioner would like to describe Robinson as "second chair" and unfamiliar with the case, the record belies this assertion. Robinson herself told the trial court she was called into the case because of her extensive experience in criminal law, having solely a criminal law practice, as opposed to Brand who had a "mixed practice" and needed Robinson's advice. 2/25.50-51. And it was Robinson who represented the petitioner at the evidentiary hearing. arguably the most complex part of the case. The trial court did not deprive the petitioner of counsel – she

was represented by her retained attorneys. The trial court did not replace counsel. The trial court did not interfere with the petitioner's access to counsel. The trial court did make the determination that it was unnecessary to continue this case of little complexity. As it happened Brand was absent for two mornings of this two and one half day trial. The words of Chief Justice Burger in *Morris v Slappy*, 461 US 1, 103 SCt 1610, 75 LEd2d 610 (1983), are applicable to this case:

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel. *Ungar v Safite*, 376 US 575, 84 Sct 841. 849. 11 LEd2d 921 (1964).

The trial court's ruling was not unreasoned and arbitrary; it was not an abuse of discretion.

RELIEF

WHEREFORE, the Respondent prays that this Court deny certiorari in this matter.

Respectfully submitted,

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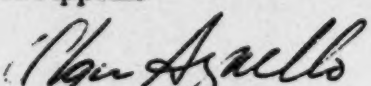

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